SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 230.

PETER J. CARPENTER, Petitioner,

vs.

WABASH RAILWAY COMPANY et al., Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Eighth Circuit.

BRIEF

For Respondents, Wabash Railway Company, and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company.

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For Respondents, Wabash Railway Company, and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company.

The Respondents, Wabash Railway Company and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, state to the Court that they adopt as and for their brief in opposition to the petition for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, the brief of Respondent, The Chase National Bank of the City of New York, as Trustee, heretofore filed in opposition to said petition, and respectfully request that the Court accept and consider the brief of said Respondent as and for the brief of these Respondents now appearing, and that the Court will deny the petition for writ of certiorari.

These Respondents, however, and in addition to the brief of the Respondent, The Chase National Bank of the City of New York, as Trustee, state to the Court that on September 1, 1939, they received a supplemental brief in support of the petition for the writ of certiorari in which supplemental brief counsel for petitioner call attention to the Act of Congress approved August 11, 1939, which was long after all the proceedings were had, as shown by the record filed herein, and after the petition for the writ and the record were lodged in this court, and asked that the amendment of the Bankruptcy Act as made by said Act of Congress, approved August 11, 1939, be considered as applicable to the record, proceedings and evidence in the matter of the claim of the petitioner filed in the Wabash Receivership proceedings in the District Court of the United States for the Eastern District of Missouri on or before July 1, 1932.

These Respondents state to the Court that if it should be the judgment of the Court that the amendment to the Bankruptcy Act made by the Act of Congress, approved August 11, 1939, should be considered in determining whether said District Court erred in denying the application of the petitioner for leave to file an intervening petition (Record pp. 51 to 77), then, and in that event, the cause by an order of this Court should be remanded to the Circuit Court of Appeals, or to said District Court, so that the Circuit Court of Appeals might consider and determine whether the said District Court was in error in denying the application for leave to file the intervening petition, and that thereafter the cause might be remanded to said District Court for its consideration and determination whether, in the exercise of its judicial discretion in the light of the record and subsequent proceedings pertaining to the claim of the petitioner filed in said receivership suit, the application of the petitioner for leave to file said intervening petition ought to be granted or denied.

The Respondents respectfully call the attention of the Court to its decisions in the case of State ex rel. Wabash Railway Company v. Public Service Commission, 273 U. S. 126, 131; Patterson v. Alabama, 294 U. S. 600, 607, and the

decision in State Tax Commission of Utah v. Van Cott, No. 491, decided March 27, 1939, not yet officially reported, appearing in 59 Supreme Court Reporter 605, being a case on writ of certiorari to the Supreme Court of Utah.

In the case last mentioned the Court, in the opinion of Mr. Justice Black, stated the approved procedure in a quotation from Patterson v. Alabama, supra, as follows:

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review, but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act. We have said that to do this is not to review, in any proper sense of the term, the decision of the state court upon a non-federal question, but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case."

The Court then said in the Van Cott case:

> "Applying this principle, we vacate the judgment of the Supreme Court and remand the cause to that court for further proceedings."

In the light of this statement of the principle, if the Court should consider that the judgment of the District Court and the decision of the Circuit Court of Appeals upon the application of the petitioner for leave to file said intervening petition, ought to be considered in the light of the amendment made by the Act of Congress approved August 11, 1939, then it would seem that the esablished and appropriate procedure to be followed in this cause, as now presented to this Court, would be to remand the cause to the Circuit Court of Appeals to be considered by that Court and thereafter remanded to the District Court if the Circuit Court of Appeals should be of the opinion that the Dis-

trict Court abused sound judicial discretion and erred in denying the application of the petitioner for leave to file said intervening petition under the facts and the law as might then be presented to that Court.

Wherefore, these Respondents, although still contending that the petition for writ of certiorari should be denied, respectfully show to the Court that if the Court should be of the view that the petition should not be denied, in that event the order of this Court should be that the cause be remanded to the Circuit Court of Appeals for the consideration and decision of that Court upon the record before it in the light of the amendment made by the Act of Congress, approved August 11, 1939, or to the District Court for its consideration, and for such alternative rule and order of the Court these Respondents will ever pray.

Respectfully submitted,

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